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No. 88-1762

In The

Supreme Court of the United States

October Term, 1988

ROBERT KIDD, et al.,

Petitioners,

vs.

THE F/V ST. PATRICK, et al.,

Respondents.

AGNES BERGEN, et al.,

Cross-Petitioners,

vs.

THE F/V ST. PATRICK, et al.,

Cross-Respondents.

REPLY TO RESPONSE TO PETITIONS FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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ARGUMENT

I. RECOVERY OF PUNITIVE DAMAGES UNDER A SURVIVAL REMEDY

A. NO NEED TO REVERSE OFFSHORE LOGISTICS AND HIGGENBOTHAM

In the very introduction to their opposition, pg. 2, Defendants seek to characterize as a concession of weakness the passing suggestion of plaintiffs that one alternative to again attempting to navigate this chartless Sargasso Sea which *Mobil Oil Corp. v. Higgenbotham*, 436 US 618, 86 L.Ed.2d. 581 (1978) sets this court to cross, is to do what *Moragne v. State Marine Lines Inc.*, 398 US 375, 26 L.Ed.2d. 339 (1970) did after years of similar attempts, and return to the beginning.

Higgenbotham reset the course and mandated that the considered intent of Congress be the polestar; and to paraphrase Admiral Farragut, ordered, "Damn the inconsistencies; full speed ahead!" But *Offshore Logistics v. Tallentire*, 477 US 207, 91 L.Ed.2d. 1974 (1986) revealed what a perilous order that was, ramming the good ship "wrongful death recovery" upon a reef of severe inconsistency in DOHSA's legislative history, and holing this vessel, which only major patchwork could contain.

In making these emergency repairs this court has and will take criticism that it too bent Congressional intent no less than the *Moragne* court did. But Plaintiffs' suggestion that the *Moragne* course is the lesser of two evils promoting the cause of complete uniformity in maritime law and justice, is no concession that *Higgenbotham's* course weakens their particular plank in this ship. On the contrary, this case perhaps provides a method whereby the principals of Higgenbotham and *Moragne* can be reconciled and the voyage continued indefinitely in an acceptable fashion until such times, if ever, Congress comes to its rescue.

B. STATUTORY OVERVIEW

Defendants only briefly address and appear to tacitly concede that punitive damages are recoverable in an appropriate maritime tort. See Response, pg. 2. Instead Defendants' argument appears limited to the proposition that punitive damages should merely not be permitted in a "wrongful death" action, (including a survival action) due to Congress' "considered judgment" on the issue in DOHSA (and the Jones Act), which Defendants argue *Higgenbotham* then prohibits this court in fashioning any maritime common law remedy to correct.

Petitioners will refute that analysis, but they do not contest that the "statutory overview" described by defendants at pg. 2-3 generally frames the legal context in which this issue arises, although it contains several errors.

First, there is DOHSA; it does not expressly include a survival provision, but neither does it expressly reject the remedy. Maraist, *Maritime Wrongful Death – Higgenbotham Reverses Trends and Creates New Questions*, 39 La. L.R. 81, 92 (1978); Smith, *A Maritime Survival Remedy: Is There Life After Higgenbotham?* 6 Mar. Lawyer, 185 (1981).

Second, there is the Jones Act. Though enacted by the same Congress that enacted DOHSA, it was not enacted at the same time, and its provisions are so hopeless in conflict with DOHSA on many major provisions that little can be gleaned as to Congress' intent as to the relationship between them. *American Export Lines v. Alvez*, 446 US 274, 283, 100 S.Ct. 1673, 1678 (1980). Unlike DOHSA, the Jones Act does include an express survival remedy for personal injury before death in its incorporation of FELA, 45 USCA § 59. See Hughes, *Death Actions In Admiralty*, 31 Yale L.R. 115, 119-120, 124 (1921). Punitive damages for injuries under the Jones Act are not explicitly precluded, though some lower courts have held that they are. Other lower courts have recently questioned those holdings. *Complaint of Merry Shipping*, 650 F.2d. 622, 626 (5th Cir., 1981). But it is not an unsettled question as to whether

damages are limited to pecuniary loss in a Jones Act survival action. On the contrary, this court expressly held they are not. *Gillespie v. United States Steel Corp.*, 379 US 148, 156, 13 L.Ed.2d. 199, 205 (1964); see also, *Cook v. Ross Island Sand & Gravel*, 626 F.2d 746 (9th Cir., 1980).

Third, the general maritime law provides a remedy for wrongful death based on unseaworthiness for seamen and negligence to others. Though Defendants state that this Court has not addressed whether the general maritime law includes a survival action for nonpecuniary loss, Defendants concede that all the courts that have considered the issue,[1] except the *Bergen* court here, have allowed the recovery, including a cause of action for punitive damages. And Defendants ignore contrary language in *Kernan v. American Dredging Co.*, 355 US 426, 430, Fn. 4, 2 L.Ed.2d. 382, 387 (1958), and reaffirmed in *Gillespie*, supra, 379 US at 137, 13 L.Ed.2d. at 206 (1964). The Jones Act recovery for a seaman may be joined with a DOHSA action and recovery had under both. *Moragne*, supra, 398 US at 396, Fn. 12, 26 L.Ed. at 354.

Finally, whether plaintiffs (particularly non-seamen) may look to a state survival statute to supplement DOHSA (which is silent as to a survival remedy) was expressly and pointedly left open in *Offshore Logistics Inc. v. Tallentire*, 477 US at 218, Fn. 1, 91 L.Ed.2d. at 184 Fn. 46 (1986). Defendants concede Alaska has such a survival statute, and that punitive damages are recoverable under

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[1] Those Court of Appeals decisions being *Dugas v. National Aircraft*, 438 F.2d. 1386, 1390 (3rd Cir., 1971); *United States Steel Corp. v. Furman*, 407 F.2d. 1143, 1148 (6th Cir., 1969); *In Re. Marine Sulphur Queen*, 460 F.2d. 89, 105 (2nd Cir., 1972), *cert den sub nom Marine Sulphur Trans Corp. v. Head*, 409 US 982, 34 L.Ed.2d. 246 (1972); *Barbe v. Drummond*, 507 F.2d 794 (1st Cir., 1974); *Complaint of Merry Shipping* supra, *Evich v. Morris* (Evich II), 819 F.2d. 256 (9th Cir., 1987); and now *Matter of P&E Boat Rentals Inc.*, 872 F.2d. 642, 650 (5th Cir., 1989).

it, and nowhere contest that Alaska's survival statute has been expressly made applicable to the high seas, AS 44.03.010-.040.

With the foregoing statutory framework as corrected, Plaintiffs will proceed to reply to each of Defendants underlying argument in response to Plaintiffs' petition, although to more clearly demonstrate their point Plaintiffs will reorder them.

C. NONPECUNIARY DAMAGES, INCLUDING PUNITIVE DAMAGES, ARE AVAILABLE UNDER A JONES ACT SURVIVAL ACTION WITH OR WITHOUT DOHSA

Defendants argue at pg. 6 of their opposition that the Jones Act precludes recovery of nonpecuniary punitive damages, but their argument truly begs the point which is, does the Jones Act mean what it says in its grant of a "survival remedy" pursuant to its incorporation of FELA, 45 USCA § 59, by reference, and is *Gillespie v. United States*, supra, good law? If the answer is yes, Defendants' argument must fail, because the law is clear that seamen such as Plaintiffs are entitled to the benefits of *both* the Jones Act and DOHSA in a high seas accident. *Moragne*, 398, supra, at 396 Fn. 12, 26 L.Ed. at 254. And it is then irrelevant whether DOHSA's absence of an express survival remedy, is an indication of Congressional intent to preclude a survival action and thereby under the auspices of *Higgenbotham*, this Court is precluded from creating one.

This concept is a lynchpin in the analysis which Defendants wish to ignore, because if the fact that Congress intended seamen a survival action including nonpecuniary loss is considered separate and apart from the elements of that action (i.e., whether it may include punitive damages or not), then there is nothing to suggest that when Congress passed DOHSA (months before the Jones Act) it intended to deny seamen a right to nonpecuniary loss in some judicially created wrongful death and survival action that would be created at common law,

following development in the law of unseaworthiness in the 1940's and *Moragne* in 1970. See Gilmore & Black, *Law of Admiralty*, 2d, 383-396. On the contrary, then the Jones Act clearly evidences Congress' "considered judgment" that seamen should have the benefits of a survival action regardless where their predeath injuries occurred, and the law has always been that the seaman's remedy for *injuries* due to unseaworthiness have followed him onto the high seas. This principal is so clear that as noted by the court of appeals below, Defendants conceded both Plaintiffs' entitlement to both the nonpecuniary damages of predeath suffering and the surviving seamen's legal entitlement to a punitive damages award. *Bergen v. F/V ST. PATRICK*, 816 F.2d. 1345, 1349 Fn. 2, 3.

The only remaining question then under the Jones Act analysis is whether the nonpecuniary damages due an injured seaman under the Jones Act is somehow limited to deny punitive damages? As Defendants acknowledge in their opposition, pg. 6-7, this is an unsettled area of law, with an unsettling conclusion. Namely, that if there is no recovery for punitive damages, it must arise out of the "pecuniary loss" language for wrongful *death* damages. The failure of this analysis is that, as Plaintiffs have previously pointed out, this restriction would also deny injured seamen recovery for pain and suffering (predeath or otherwise), and that is neither logical nor is it the law. *Gillespie*, supra.

It is on the other hand not illogical that Congress would deny a seaman or a railway worker *death* damages beyond pecuniary loss. At the time of the passage of both FELA and the Jones Act there was no cause of action for wrongful death. *Moragne*, supra. Dahlquist, *Punitive Damages Under the Jones Act*, 1, 22-26 (1981), concludes that the legislative history of these acts are silent as to Congressional intent in this regard. But Judge Fox in *Kozar v. Chesapeake & Ohio Railway Company*, 320 F.Supp. 335 (W.D. Mich., 1978); overruled *Kozar v. Chesapeake & Ohio Railway*

Co., 449 F.2d. 1238 (6th Cir., 1971), disagrees. More significantly Dahlquist ignores the "pecuniary loss" language in the wrongful *death* recovery provisions of FELA, but its absence from the injury and survival provisions despite a proposed amendment to the 1910 revision of FELA to provide for such a limitation in the survival remedy. *Wildman v. Burlington Northern R. Co.*, 825 F.2d. 1392 (9th Cir., 1987).

The only thing that would apparently satisfy Defendants is the existance of an express punitive damages provision. However, this court, in the absence of clear legislative intent, has never imposed such a strict requirement on any other act of Congress granting a "new" tort remedy. On the contrary, in the absence of an expression of Congressional intent, the presumption is Congress intended the common law, as it existed at the time of the legislation to provide the elements of the remedy. And by 1910 punitive damages clearly were recognized. Compare *Smith v. Wade*, 461 US 30, 75 L.Ed.2d. 632 (1983).

Aside from the salutary effect of punitive damages such a result promotes uniformity of recovery by seamen who clearly have this element in an unseaworthiness action.

1. NONPECUNIARY DAMAGES (INCLUDING PUNITIVE DAMAGES) ARE AVAILABLE UNDER THE GENERAL MARITIME LAW SURVIVAL ACTION WHEN JOINED WITH A JONES ACT CLAIM AND A CLAIM UNDER DOHSA

It is the 9th Circuit's decision in *Bergen* below not to award punitive damages under the general maritime law which puts it in direct conflict with the 5th Circuit's decision in *Complaint of Merry Shipping*, supra, recently reaffirmed in *P&E Boat Rentals*, supra, and its own circuit in *Evich II*, supra. Even if this court were to conclude that the Jones Act does not include a remedy for punitive damages, the undisputed conclusion of all courts considering the issue is that the general maritime law does.

This being the case, the only question is as Smith, supra, asks: *A Maritime Survival Remedy: Is There Life After Higgenbotham?* The response is that if there is not, insofar as this policy applies to seamen, then the denial of this common law remedy does at least as much injustice to Congress' considered judgment expressed in the survival provisions of the Jones Act, as it does to whatever can be said of Congress' considered judgment in failing to mention such a remedy in DOHSA. *Higgenbotham* of course did not consider this issue, because that was not a seaman's case. Nor was *Offshore Logistics*.

Nor was *Higgenbotham* a survival action, and as a result it failed to expressly consider the meaning of the only provision in DOHSA, 46 USCA § 765, addressing survival, which does not deny a survival remedy. Smith, supra, at 195-197. See also, Maraist, supra, at 94. In the absence of a statute directly addressing the issue this court is free to judicially craft a remedy under the general maritime law. *Alvez*, supra, 446 US, at 282, 100 S.Ct. at 1678 (1980). It would appear that this observation was the reason this court pointedly wrote Fn. 1 in *Offshore Logistics*, supra, 477 US at 215, 91 L.Ed. at 184.

Abrogation of a common law survival remedy would not promote uniformity as Professor Morist obliquely suggests, because there would still remain a Jones Act survival remedy at least within territorial waters, even if it could have somehow said to not exist when joined with a DOHSA action.

The denial of a survival action also leads to the absurd result that it is all right to kill a man, but not to injure him; and if no punitive damages remedy exists under the Jones Act, survival remedy, why not? Since many seamen do tend, by the nature of their calling to be without families, this implication is particularly grave. At the very least, it would be a disincentive to rescue. All these reasons and more led to the general common law or statutory survival actions that exist throughout the United States today.

2. STATE SURVIVAL STATUTES

Because Plaintiffs are all seamen having a Jones Act survival remedy, including an action for punitive damages, it is unnecessary for this court to address the issue here expressly left open by *Offshore Logistics*, supra, Fn. 1, as to whether a state survival law may supplement DOHSA or whether DOHSA may be supplemented by the general maritime law.

As previously noted, the controversy in *Offshore Logistics* lends credibility to the argument that it was the considered judgment of Congress to allow this remedy, but that judgment predated *Moragne*.

If on the contrary, the legislative history suggests that Congress did not consider survival actions, the principal of uniformity would suggest a general maritime law survival action. That such an action could engulf DOHSA because as the court below observed, few deaths at sea are instantaneous, merely means that for most high seas deaths, there will be a remedy. Whereas currently for many, perhaps very negligent deaths under DOHSA, there is none.

However, in the remote event this court were to reach this issue, Plaintiffs have no reservations of taking "any port in a storm". As the strong dissent in *Offshore Logistics* points out, it was the intent of Congress that state law remedies be available even on the high seas. Alaska, having granted that remedy, it is the will of Congress that remedy be enforced as a supplement to DOHSA.

II. THE 9TH CIRCUIT DID ERR IN HOLDING THAT THE TRIAL COURT'S FACTUAL FINDINGS WERE INSUFFICIENT TO AWARD PUNITIVE DAMAGES

On this petition for certiorari, this court does not have the record, only the trial court's findings. If the Defendants wish to somehow establish that the master and mate of this vessel were well qualified, and that their only error was to fail to "fill out proper paperwork", they

must support this claim with the record, because the law is clear that the ST. PATRICK required not merely a master and mate, but also an engineer, and that 46 CFR § 10.15-31(b) (2) IV, (C) (V), (e) (2) required that the holder of each 200 ton master, mate and engineer license must pass a test which could have prevented this accident. Petition Appendix A-33, Conclusion 4. Defendants simply ignore that they knew that none of their officers had taken this test, and that in its absence we have only Defendants' unsubstantiated word as to their qualifications. Moreover, Defendants blithely overlook that they personally knew they had never even went so far as handing an application to some "would be" engineer, and that they has personal knowledge that their "would be" master had left the vessel before the voyage, and that they *personally* knew well before the fatal storm that she was solely in command of her "would be" mate. It was not merely a lack of licensed officers of which Defendants were personally warned, but a near total lack of any officers of which Defendants were also personally aware; and despite Coast Guard warnings and a promise of compliance, nevertheless specifically ignored, that caused the deaths of ten men and the severe injuries to two.

Defendants criticize the Plaintiffs for creating issues of law where none exist. But a court of appeals review of a trial court's findings is one of law. More importantly, following the recent decision of the 5th Circuit in *Matter of P&E Boat Rentals*, supra, at 650, to follow the 6th Circuit in *Furman*, supra, and rejecting the 9th Circuit's view expressed in *Protectus Alpha Navigation Co. v. North Pacific Grain Growers*, 767 F.2d. 1379 (9th Cir., 1985), a split between the circuits now exists which would justify this court's intervention on the issue of the proper circumstance for an award of punitive damages, as well as the grounds of a far departure from the accepted and usual course of judicial proceedings.

Plaintiffs respectfully suggest that regardless of which circuit's views on the subject is adopted, the test is

met here by these Defendants, all corporate officers who had personal longstanding notice of these statutory deficiencies and willfully chose to continuously ignore them despite their promises to the Coast Guard.

CONCLUSION

The implementation of an award of punitive damages of a Jones Act, general maritime law, or state supplementary survival action in this case will effectuate the considered judgment of Congress in the Jones Act, and will not thwart its intent under DOHSA. Moreover, it will recreate most of the uniformity that was attempted in *Moragne*, and at the same time provide a comprehensive and fair maritime recovery to all persons killed upon maritime waters which directly complements the rights of persons injured on maritime waters.

If following the judicial recognition of such a common law remedy, Congress wishes to intervene to amend Dohsa to provide for that small class of persons comprising nonseamen, who are killed instantly and leave no person suffering pecuniary loss, it may simply do so. If on the other hand, Congress elects to leave this complex area untouched as it has since 1920, this court can be assured that without impeding the will of Congress, a generally fair system of maritime recovery for wrongful death may exist indefinitely. And this heretofore endless voyage in search thereof in this and the numerous lower courts may finally come to a just end.

Respectfully submitted on this 1st day of August, 1989, from Kodiak, Alaska.

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